NO. 85697-4

SUPREME COURT OF THE STATE OF WASHINGTON

LEASA LOWY,

Respondent,

v.

PEACEHEALTH, a Washington corporation;
ST. JOSEPH HOSPITAL; and UNKNOWN JOHN DOES,

Petitioners.

PETITIONERS' ANSWER TO WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION'S AMICUS BRIEF

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I. ARGUMENT

A. Courts May Not Rewrite Statutes Under the Guise of "Strict Construction".

Subject to five enumerated exceptions not applicable here, RCW 70.41.200(3) provides:

> Information and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action, and no person who was in attendance at a meeting of such committee or who participated in the creation, collection, or maintenance of information or documents specifically for the committee shall be permitted or required to testify in any civil action as to the content of such proceedings or the documents and information prepared specifically for the committee. . . .

Citing three decisions of this Court that involved no issue relating to RCW 70.41.200(3),[1] the Washington State Association for Justice Foundation (WSAJF) asserts, *WSAJF Br. at 7-8*, that the Court of Appeals properly construed the word "*review*" in RCW 70.41.200(3) to mean "*external review by others*," because statutes creating privileges must be "strictly construed and limited to their purposes." But strict construction

[1] *Coburn v. Seda*, 101 Wn.2d 270, 677 P.2d 173 (1984); *Anderson v. Breda*, 103 Wn.2d 901, 700 P.2d 737 (1985); and *Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 864 P.2d 921 (1993). Although the hospital in *Adcox* argued that certain documents were protected under RCW 70.41.200(3) and RCW 4.24.250, the *Adcox* court concluded that, because the documents at issue were created before RCW 70.41.200(3) took effect, and the legislature had not made the statute retroactive, RCW 70.41.200(3) did not apply.

does not license a court to add words to a statute, or to find a limited "purpose" that the statutory text does not support.

A court "may not add language to a clear statute, even if it believes the Legislature intended something else but failed to express it adequately." *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). A statute "is not ambiguous merely because different interpretations are conceivable." *State v. Tili*, 139 Wn.2d 107, 115, 985 P.2d 365 (1999). "Without a threshold showing of ambiguity, the court derives a statute's meaning from the wording of the statute itself, and does not engage in statutory construction . . . ." *Id.*

> "Courts should assume the Legislature means exactly what it says" in a statute and apply it as written . . . . Statutory construction cannot be used to read additional words into the statute. . . .

Densley v. Dep't of Retirement Systs., 162 Wn.2d 210, 219, 173 P.3d 885 (2007) (citations omitted).

Counsel for PeaceHealth has found no Washington authority allowing a court to add words to an unambiguous statute because the statute creates a privilege or is subject to "strict" construction. None of the three cases relied upon by WSAJF – *Coburn v. Seda*, 101 Wn.2d 270, 677 P.2d 173 (1984); *Anderson v. Breda*, 103 Wn.2d 901, 700 P.2d 737 (1985); and *Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 864

P.2d 921 (1993) – did so. None of them, under the guise of statutory construction or otherwise, added words to RCW 4.24.250, the privilege statute at issue in those cases. This Court has not endorsed, and should not now endorse, an approach to statutory interpretation that enables courts to add words to a statute (not even words the Court believes the Legislature inadvertently omitted) under the guise of strict construction or otherwise. Nor should this Court countenance poking loopholes in statutes in order to keep the "threshold" for discovery in civil litigation discovery "low", as WSAJF suggests, *WSAJF Br. at 10*, or for any other reason. Instead, courts '"should assume the Legislature means exactly what it says' in a statute and apply it as written." *Densley*, 162 Wn.2d at 219.

With respect to WSAJF's argument that enforcement of RCW 70.41.200(3) must be limited to that statute's purpose, WSAJF erroneously assumes that the purpose of RCW 70.41.200(3) is limited to the purpose of RCW 4.24.250 that this Court articulated in *Coburn* and *Anderson*. But RCW 70.41.200, which was enacted after *Coburn* and *Anderson* were decided and which is worded in materially different ways from RCW 4.24.250, has dual purposes. First, unlike RCW 4.24.250 which did not require hospitals to have "peer review" programs, RCW 70.41.200(1) *mandates a* "coordinated quality improvement program" in

every hospital, and spells out numerous required features of such programs. One such feature is:

> The establishment of a quality improvement committee with the responsibility to review the services rendered in the hospital, both retrospectively and prospectively, in order to improve the quality of medical care of patients and to prevent medical malpractice [which] committee shall oversee and coordinate the quality improvement and medical malpractice prevention program and shall ensure that information gathered pursuant to the program is used to review and to revise hospital policies and procedures.

RCW 70.41.200(1)(a).

Second, the manifest purpose of RCW 70.41.200(3) is to encourage hospitals to engage aggressively in critical self-examination pursuant to RCW 70.41.200(1) *without having to be concerned that information they gather will be used against them.*[2] RCW 70.41.200(3) makes it clear that "[i]nformation and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action . . . " By contrast, RCW 4.24.250, as it

[2] RCW 70.41.200(3), as well as RCW 70.41.200(2), the section immediately between RCW 70.41.200(1) and (3), take similar pains to protect individuals who provide information to, or who participate in, hospital quality improvement activities, from liability or from having to testify concerning those activities. That the Legislature meant to make quality improvement activities, information, and documents off limits to plaintiffs suing hospitals – except when the plaintiff is a health care provider suing over restriction or revocation of his or her hospital staff privileges, *see* RCW 70.41.200(3)(c) – is clear from the face of the statute.

was worded when *Coburn* and *Anderson* were decided, prohibited discovery of a narrower universe of "peer review" information:

> The proceedings, reports, and written records of [hospital peer review] committees or boards, or of a member, employee, staff person, or investigator of such a committee or board, shall not be subject to subpoena or discovery proceedings in any civil action, except actions arising out of the recommendations of such committees or boards involving the restriction or revocation of the clinical or staff privileges of a health care provider as defined above. [Underline added.]

Thus, a textual basis existed in the 1980s for construing RCW 4.24.250 as having, as its purpose, the protection against discovery of "proceedings, reports, and written records" and not more generally the protection of quality improvement committee "information and documents," which RCW 70.41.200(3) protects from review, disclosure, discovery, or introduction into evidence.

B. Legislative History Is Not Pertinent Because RCW 70.41.200(3) Is Not Ambiguous.

WSAJF argues, *WSAJF Br. at 8-9*, based on certain 2005 legislative history that the Court of Appeals cited, *Lowy v. PeaceHealth*, 159 Wn. App. 715, 723, 247 P.3d 7, *rev. granted*, 171 Wn.2d 1027 (2011), that the addition of the words "review or disclosure" to RCW 70.41.200(3), was meant only to prevent extrajudicial public release of quality improvement records. But courts resort to legislative history only when a statute is ambiguous. *Cerrillo v. Esparza*, 158 Wn.2d 194, 202,

142 P.3d 155 (2006); *Dep't of Ecology v. Campbell & Gwynn, LLC*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002).

RCW 70.41.200(3) is not ambiguous. It, in no uncertain terms, plainly states that "[i]nformation and documents, including complaints and incident reports, created specifically for, and collected and maintained by, a quality improvement committee are not subject to review or disclosure, except as provided in this section, or discovery or introduction into evidence in any civil action . . . " Nothing in RCW 70.41.200 admits of any exception for internal review of such quality improvement information and documents to respond to, or to locate information to respond to, a medical malpractice plaintiff's discovery requests.

C. RCW 70.41.200(3) Does Not Create an Unjustified "Artificial Shield" to Discovery.

WSAJF endorses, *WSAJF Br. at 9*, the Court of Appeals' view, *Lowy*, 159 Wn. App. at 723, that enforcing RCW 70.41.200(3) as written would create "an unjustified 'artificial shield'" to discovery. But "justification" is not a test courts apply when deciding to enforce statutes, and calling the quality improvement privilege's shield "artificial" denigrates a choice the Legislature made to protect hospitals from being prejudiced as a result of their compliance with the quality improvement requirements of RCW 70.41.200(1). It is also a label that could just as

easily be applied pejoratively to any statutory privilege, including the attorney-client privilege, that exempts from discovery what otherwise might prove to be relevant information.

D. The RCW 70.41.200(3) Privilege Is Not Conditioned on a Hospital's Ability to Demonstrate, or a Trial Court's Willingness to Find, that Quality Improvement Information Demanded by a Plaintiff in a Civil Case Has Been Put to a Particular Quality Improvement Use.

Quoting from *Anderson*, 103 Wn.2d at 907, WSAJF contends, *WSAJF Br. at 9*, that protection of hospital quality improvement records is permissible pursuant to RCW 70.41.200(3) "only . . . when disclosure would stifle 'open discussion during [quality improvement] committee investigations.'" Even if that was a valid statement with respect to RCW 4.24.250 (the statute under review in *Anderson*) as it was worded in 1984-85, there is no basis for such an assertion with respect to RCW 70.41.200(3), a differently worded statute enacted after *Anderson* w as decided. And, the textual changes the Legislature has made to RCW 70.41.200(3) since its enactment in 1986 refute WSAJF's contention.

As the Supreme Court noted in *Adcox*, 123 Wn.2d at 29-30, the version of RCW 70.41.200(3) that had been in effect until 1993 provided in pertinent part that:

> Information and documents, including complaints and incident reports, created, collected, and maintained about health care providers arising out of the matters that are

> under review or have been evaluated by a review committee conducting quality assurance reviews are not subject to discovery or introduction into evidence in any civil action. . . . [Underline added.]

The 1993 amendment, Laws of 1993, ch. 492 § 415, deleted the words underlined above.[3] The effect was to eliminate any argument that only *certain kinds* of quality improvement information and documents – ones "about health care providers" and "arising out of" matters reviewed or under review – are subject to protection from discovery in any civil action.

Since the 1993 amendment to RCW 70.41.200(3), it is immaterial to the application of the privilege what specific quality improvement purposes information was collected for, or what actual use(s) have been or will be made of "information or documents" created for, and collected and maintained by, a hospital quality improvement committee. *All* information created specifically for, and collected, and maintained by, a hospital quality improvement committee is off limits for review, disclosure, discovery, and introduction into evidence in any civil action (except one brought by a health care provider suing over restriction or revocation of his or her hospital staff privileges, *see* RCW 70.41.200(3)(c)). To hold otherwise would be analogous to a court forcing a lawyer to disclose

[3] The 1993 amendment also added the words "specifically for and" after "created"; changed "committee conducting quality assurance review" to "quality improvement committee"; and added what is now exception (a).

the kind or subject matter of information his or her client conveyed in an attorney-client communication, and/or the use(s) to which the information has been or will be put, in order to rule on a claim of attorney-client privilege.

E. Contrary to WSAJF's Dismissive Argument, Allowing Trial Courts to Compel Review of Hospital Quality Improvement Committee Information in Aid of Discovery by Plaintiffs Suing for "Corporate Negligence" Will Discourage and Disincentivize Hospitals from Collecting Information to Identify Patterns of Care and Outcomes that Might (or Might Not) Warrant Quality Improvements.

WSAJF asserts, *WSAJF Br. at 9-10*, that ordering PeaceHealth to review its quality improvement information in aid of Lowy's discovery requests "does not *dis*-courage or *dis*-incentivize critical self-assessment." WSAJF is simply wrong. Optimal critical self-assessment goes beyond the many, but finite, requirements of RCW 70.41.200; it is in the interests of hospitals and patients alike for hospitals to gather data to analyze for trends in patient care, both favorable and unfavorable, that might enable hospitals not only to avoid mistakes – by no means all of which result in patient injuries, much less injuries prompting lawsuits – but also to provide *even better care*. If hospitals must expect that any and all data they collect, "good" as well as "bad," will become a discovery treasure trove for the plaintiffs' personal injury bar, some may opt for less than

optimal critical self-assessment, and conduct only the bare minimum needed to satisfy licensure requirements.

Moreover, the Court should take into consideration what affirmance of the Court of Appeals' decision will mean in practice. If, despite RCW 70.41.200(3), information in hospital quality improvement committee records constitutes a potential avenue to securing evidence a plaintiff could not otherwise obtain in aid of "corporate negligence" claims against hospitals,[4] plaintiffs' lawyers will routinely serve CR 30(b)(6) notices or subpoenas on hospitals for the purpose of ascertaining what quality improvement databases exist; what kinds of information they track; and how they are organized. Hospitals then will be served with discovery requests for, and/or motions to compel review of, their quality improvement databases and disclosure of "non-privileged" matters that information in those databases reflect. The Court thereby will have converted collections of quality improvement information that the Legislature made off-limits to plaintiffs in civil cases when it required hospitals to put in place coordinated quality improvement programs as a

[4] The ironies of this case are not only that is it undisputed that searching individual PeaceHealth patient files for "IV incidents" occurring over a several-year period would be prohibitively burdensome, but also that the only reason Dr. Lowy had any reason to think that the CUBES database may make identification of patient records of "IV incidents" possible is that she herself was made aware of that in her capacity as a member of the hospital's quality improvement committee.

condition of licensing[5] into what WSAJF says, *WSAJF Br. at 13*, should be "a document retrieval system that would enable [hospitals] to respond to [plaintiffs' discovery] requests" that hospitals should be obligated to maintain for discovery purposes. What was meant to be a shield protecting hospital quality improvement information will have been transformed alchemically into a discovery sword at plaintiffs' disposal.

F. The Discovery Rules Are Not Supposed to Operate in a Way that Defeats Privileges.

WSAJF asserts, *WSAJF Br. at 10*, that PeaceHealth "fails to appreciate the fundamental nature of the discovery rules, and how they are supposed to operate," and how "low" a "threshold" there is for discovery. WSAJF ignores the fact that ER 501 recognizes the Legislature's power to create privileges and lists numerous statutes that do so,[6] as well as the fact that CR 26 – the primary discovery rule on which WSAJF relies – provides, in subsection (b)(1), that a party may obtain discovery

[5] *See* RCW 70.41.200(6) ("Failure of a hospital to comply with this subsection is punishable by a civil penalty not to exceed two hundred fifty dollars") and RCW 70.41.200(7) ("The department [of health], the joint commission on accreditation of health care organizations, and any other accrediting organization may review and audit the records of a quality improvement committee or peer review committee in connection with their inspection and review of hospitals. Information so obtained shall not be subject to the discovery process, and confidentiality shall be respected as required by subsection (3) of this section. Each hospital shall produce and make accessible to the department the appropriate records and otherwise facilitate the review and audit").

[6] Although RCW 70.41.200(3) is not among the statutes ER 501 lists, the rule provides that the list "is not intended to . . . abrogate any privilege by implication or omission."

"regarding any matter, *not privileged* . . . ." [Italics added]. The discovery rules expressly *respect* privileges; they are not "supposed to operate" in ways that defeat privileges.

G. That a Statutory Privilege Applies Is "Good" – and Plenty of – "Cause" to Enter a Protective Order.

WSAJF implies, *WSAJF Br. at 11*, that the trial court should not have protected PeaceHealth's quality improvement information because PeaceHealth did not show "good cause" for entry of a protective order by presenting "specific, substantiated, and concrete evidence" that, if it is required to review those records in aid of plaintiff Lowy's discovery, it would suffer "prejudice or harm."[7] But, as WSAJF acknowledges, *WSAJF Br. at 10,* such a showing of prejudice or harm needs to be made only in the *absence* of a privilege. If, as PeaceHealth contends and the

[7] Because the "prejudice/harm" argument is made only by WSAJF as *amicus*, the Court may and should decline to consider it for that reason. *See Cummins v. Lewis County*, 156 Wn.2d 844, 850 n.4, 133 P.3d 458 (2006) ("Under case law from this court, we address only claims made by a petitioner and not those made solely by amici"). Moreover, because WSAJF cites no authority involving application of a privilege to support the argument, the Court may and should decline to consider the argument for that reason as well. *See Am. Legion Post No. 32 v. City of Walla Walla*, 116 Wn.2d 1, 7, 802 P.2d 784 (1991) ("In the absence of argument and citation to authority, an issue raised on appeal will not be considered"). Although certain statutory privileges may be invoked only if the court makes particular types of findings, *e.g.*, RCW 5.60.060(5) ("A public officer shall not be examined as a witness as to communications made to him or her in official confidence, when the public interest would suffer by the disclosure"), RCW 70.41.200(3)'s quality improvement privilege is not such a finding-dependent privilege; it is at least as absolute as RCW 5.60.060(2)(a)'s attorney-client privilege.

trial court held, RCW 70.41.200(3) precludes "review or disclosure . . . or discovery" of what everyone agrees qualifies as quality improvement information, then that statutory privilege does apply and not only providing "good cause" for the trial court to issue a protective order, but also obligating it to do so.

H. Adopting WSAJF's "Only Tool" for Discovery Theory Would Take Washington Jurisprudence Down a Slippery Slope Toward Abrogation of All Non-Constitutional Privileges.

WSAJF argues, *WSAJF Br. at 11-12*, that ordering a hospital to review its quality improvement committee database in aid of a plaintiff's discovery in a civil action is consistent with RCW 70.41.200(3) not only because that statute can be strictly construed to modify "review" to mean "external review by others," but because going through the quality improvement committee database is the "only tool" available to identify the records of other hospital patients who have had (or may have had) problems involving IV administration. An "only tool" for discovery argument, however, could be used to justify invasion of any statutory privilege.

I. That Lowy Seeks Potentially Relevant Information Is Immaterial.

WSAJF argues, *WSAJF Br. at 12*, that the information Lowy seeks is potentially relevant to her corporate negligence claim and is therefore discoverable under CR 26. But CR 26(b)(1) permits discovery "regarding

any matter, *not privileged* . . . ." [Italics added]. But, unless the information at issue is at least potentially relevant, whether a privilege applies is moot. The Legislature's decision to create a privilege *ipso facto* constitutes a policy determination that evidence or information, *although relevant*, should nonetheless be protected from discovery and excluded from evidence.

As Lowy has acknowledged, *App. Br. at 6*, were it not for the existence of the quality improvement database at St. Joseph Hospital, ascertaining what, if any, other instances of actual or perceived problems with IV administration had occurred at St. Joseph Hospital prior to the one Lowy complains of would be unduly burdensome, because it would require scouring thousands of individual patient charts. That there is no other practicable way to ascertain the requested information, however, is not a valid reason to remove the protection from discovery that RCW 70.41.200(3) confers on information contained in PeaceHealth's CUBES database. Privileges exist to trump claims of relevance and admissibility. All privileges would be at risk if trial courts must weigh relevance and practicability of otherwise being able to obtain discovery of requested information before enforcing a statutory privilege. RCW 70.41.200(3) expressly protects quality improvement committee information and documents from "***review or disclosure***, except as provided in this section,

or discovery or introduction into evidence in any civil action." None of the five exceptions listed in the second sentence of RCW 70.41.200(3), nor any other provision of RCW 70.41.200, authorizes courts to ignore the privilege because the information a personal injury plaintiff seeks may be relevant or because invading the privilege provides the only practicable means of obtaining the information the plaintiff seeks in discovery.

J. Contrary to WSAJF's Assertions, Hospitals Are Not, and Should Not Be, Required to Institute Medical Record or Other Document Retrieval Systems to Facilitate Discovery By Plaintiffs in Corporate Negligence Lawsuits.

WSAJF notes, *WSAJF Br. at* 7, that RCW 70.41.190 requires hospitals to preserve patient records. That is true, but beside the point. There is no claim that PeaceHealth failed to preserve patient records. And, neither Dr. Lowy nor any other patient seeking to sue the hospital for malpractice would have standing to complain if the hospital lost or failed to keep some other patient's records. RCW 70.41.190 was not enacted to ensure the availability of Patient A's hospital records for the benefit of Patient B in the event Patient B chooses to sue the hospital for medical malpractice and assert a theory of corporate negligence.

Nor does RCW 70.41.190, or any other statute, require hospitals to maintain their patients' medical records in a format that would enable them to respond to any conceivable discovery requests that other

malpractice plaintiffs might make in aid of corporate negligence claims. Nevertheless, WSAJF, citing a trial court statement quoted in *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 586, 220 P.3d 191 (2009), apparently would have this Court impose upon hospitals an obligation to anticipate corporate negligence claims and to create medical record or other document retrieval systems that would enable hospitals to respond to any discovery requests made by malpractice plaintiffs asserting corporate negligence claims. *See WSAJF Br. at 12-13.*[8]

The Court of Appeals' decision imposes no such requirement. Lowy has made no such argument. Because the argument comes only from amicus, the Court may and should decline to consider it. *See Cummins v. Lewis County*, 156 Wn.2d 844, 850 n.4, 133 P.3d 459 (2006) ("Under case law from this court, we address only claims made by a petitioner and not those made solely by amici"). Moreover, given the extensive state and federal regulation of hospitals and medical records, this Court should be reluctant to impose additional obligations on hospitals, without the benefit of public hearings, without hearing from the numerous hospitals and other corporate healthcare providers that will be impacted, and without the ability the Legislature has to study or weigh all of the countervailing public policy concerns.

[8] In essence, WSAJF would have this Court start regulating hospitals in aid of unidentified future malpractice claimants.

Contrary to WSAJF's assertion, *WSAJF Br. at 13*, that a quality improvement committee database may be the only non-unduly-burdensome means for PeaceHealth to identify other instances of actual or suspected IV infusion incidents that Lowy seeks in discovery is not a sufficient basis to override the statutory privilege that the Legislature set forth in RCW 70.41.200(3).

K. Enforcement of a Privilege Does Not Work an Unconstitutional Denial of "Access to Courts".

WSAJF contends, *WSAJF Br. at 13-14*, that enforcing RCW 70.41.200(3) denies a malpractice plaintiff her constitutional right of "access to courts." But if recognition of the RCW 70.41.200(3) privilege denies a medical malpractice plaintiff his or her constitutional right of access to courts, then allowing a litigant to invoke the attorney-client, spousal, confessional, physician-patient, or any other established privilege – or, for that matter, to enforce an exclusionary rule of evidence, such as ER 407 (subsequent remedial measures), ER 408 (offers to compromise), ER 411 (liability insurance or lack thereof), ER 602 (lack of personal knowledge), and ER 802 (hearsay) – would also deny a plaintiff's constitutional right to access to the courts.

Providing "access to courts" does not mean that all relevant evidence is admissible, nor does it mean that all potentially relevant

evidence is discoverable. Neither *Putman v. Wenatchee Med. Ctr.*, 166 Wn.2d 974, 216 P.3d 374 (2009), nor *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780-81, 819 P.2d 370 (1991), both of which WSAJF cites, nor any other Washington decision, holds or suggests otherwise. Indeed, both *Putman* and *John Doe* speak in terms of the right of access to courts as "includ[ing] the right of discovery authorized by the civil rules" and CR 26(b)(1) authorizes "discovery regarding any matter, ***not privileged***, which is relevant to the subject matter involved in the pending litigation . . . ." [Emphasis added.]

II. CONCLUSION

For the foregoing reasons and those presented in PeaceHealth's Supplemental Brief and its briefing in the Court of Appeals, the decision of the Court of Appeals should be reversed, and the trial court's order granting PeaceHealth's motion for reconsideration (and thereby denying plaintiff's motion to compel) should be reinstated.

RESPECTFULLY SUBMITTED December 29, 2011.

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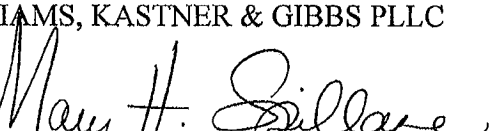
By 

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I hereby certify under penalty of perjury that under the laws of the State of Washington that on the 29th day of December, 2011, I caused a true and correct copy of the foregoing document, "Petitioners' Answer Washington State Association for Justice's Amicus Brief," to be delivered in the manner indicated below to the following counsel of record:

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